



CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 324/17 and CCT 63/18

CCT 324/17

In the matter between:

MATHYS JOHANNES CLOETE

First Applicant

DANIEL NICHOLAS CLOETE

Second Applicant

and

THE STATE

Respondent

and

LEGAL AID SOUTH AFRICA

Amicus curiae

CCT 63/18

In the matter between:

RAMMUTLANA BOELIE SEKGALA

Applicant

and

NEDBANK LIMITED

Respondent

Neutral citation: *Cloete and Another v S; Sekgala v Nedbank Limited* [2018] ZACC 6

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgment: Theron J (unanimous)
Decided on: 19 February 2019
Summary: Appeal — section 17(2)(f) of the Superior Courts Act 10 of 2013
— Constitutional Court jurisdiction

ORDER

On appeal from the Supreme Court of Appeal (in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013):

Under CCT 324/17 (*Cloete and Another v S*):

1. The applications for condonation are granted.
2. The application for leave to appeal is dismissed.
3. There is no order as to costs.

Under CCT 63/18 (*Sekgala v Nedbank Limited*):

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

JUDGMENT

THERON J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, and Petse AJ concurring):

Introduction

[1] These are two applications for leave to appeal against decisions made by the President of the Supreme Court of Appeal (President) pursuant to section 17(2)(f) of the Superior Courts Act¹ (Act). The applications raise the same question, namely, is a decision under section 17(2)(f) of the Act appealable to this Court?²

[2] Section 17(2)(f) confers on the President a discretion to refer a refusal of an application for leave to appeal to the Supreme Court of Appeal for reconsideration and, if necessary, variation (section 17(2)(f) decision). This may arise in circumstances where an applicant has been denied leave to appeal by the Supreme Court of Appeal on petition, pursuant to the provisions of section 17(2)(b) of the Act. Following this Court's decision in *Liesching I*, recourse in terms of section 17(2)(f) is available in both criminal and civil cases.³ In both these applications, the President refused to grant relief under section 17(2)(f).

Cloete application (CCT 324/17)

[3] The first applicant is Mr Mathys Johannes Cloete and the second applicant is his son, Mr Daniel Nicholas Cloete (Cloete applicants). The respondent (State) did not oppose this matter. Legal Aid South Africa applied and was admitted as *amicus curiae*.

[4] The Cloete applicants, farmers from Boshhoek, North West were charged and convicted in the High Court of South Africa, North West Division, Mahikeng with various offences, including murder, kidnapping and attempted murder. These charges

¹ 10 of 2013.

² Section 17(2)(f) reads:

“The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.”

³ *Liesching v S* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC) (*Liesching I*).

arose out of an incident of theft that had occurred at their farm. The first applicant was sentenced to an effective term of 18 years' imprisonment and the second applicant was sentenced to a term of 24 years' imprisonment.

[5] The Cloete applicants unsuccessfully applied for leave to appeal to the Supreme Court of Appeal. Their application to the President for reconsideration in terms of section 17(2)(f) of the Act was dismissed on 4 June 2016.

[6] About a year later, the Cloete applicants again applied to the President under section 17(2)(f). This application was granted and set down for hearing on 22 November 2017. However, on 13 September 2017, the Registrar of the Supreme Court of Appeal advised the Cloete applicants that their application was dismissed and that their matter was considered *res judicata*.

Sekgala application (CCT 63/18)

[7] The applicant is Mr Rammutlana Boelie Sekgala and the respondent, Nedbank Limited, is a bank and a registered credit provider (Nedbank). Nedbank did not oppose the matter.

[8] The facts in this matter are scant, partly because the applicant is self-represented. Mr Sekgala obtained a home loan secured by a mortgage bond from Nedbank. At some point, he defaulted on his repayments.

[9] In 2011, Nedbank obtained default judgment against Mr Sekgala for arrear payments. Mr Sekgala applied for, and was granted, an interim interdict staying the warrant of execution which had been obtained by Nedbank. Mr Sekgala then applied for rescission of the default judgment. According to Mr Sekgala, during this time a case was pending under case number 40429/2011 in the High Court of South Africa, Gauteng Local Division, Johannesburg. In 2014, Nedbank instituted new proceedings under case number 12231/2014 in the High Court of South Africa, Gauteng Division,

Pretoria.⁴ Thereafter the respondent filed a notice of withdrawal in case number 40429/2011.

[10] On 15 September 2015, Makume J handed down judgment in favour of Nedbank and dismissed the application for rescission. Mr Sekgala applied for leave to appeal which was denied. Mr Sekgala unsuccessfully petitioned the Supreme Court of Appeal for leave to appeal. He later made application to the President under section 17(2)(f). That application was dismissed on 27 February 2018 on the ground that no exceptional circumstances exist.

In this Court

[11] The Cloete applicants submit that their second application under section 17(2)(f) differed from the first application in material respects and that the President erred in refusing to consider it. They submit that the second application was lodged after new evidence came to light disclosing exceptional circumstances, which constituted sufficient grounds for her to vary her decision of 4 June 2016.

[12] The essence of Mr Sekgala's submissions is that the President should have found that exceptional circumstances existed warranting reconsideration.

[13] After this Court's decision in *Liesching II*,⁵ the Chief Justice issued directions in this matter on 16 October 2018 inviting the parties to make submissions on the following issues:

- “(a) What is the nature of the President's decision in terms of section 17(2)(f) of the Superior Courts Act? Is it a decision of a court?
- (b) Does this Court have jurisdiction to hear an appeal against a President's decision in terms of section 17(2)(f) under section 167(6)(b) of the Constitution?

⁴ Mr Sekgala refers to this as the “Gauteng division”.

⁵ *Liesching v S* [2018] ZACC 25; 2018 JDR 1448 (CC); 2018 (11) BCLR 1349 (CC) (*Liesching II*).

- (c) The general principle is that the exercise of public power should be subject to review. The President exercises a discretion under section 17(2)(f). Should the exercise of this power be subject to review or appeal by this Court or another court such as the High Court?
- (d) May a litigant appeal to this Court within the narrow ambit of section 17(2)(f) and thereafter, again approach this Court to consider the merits of her appeal?
- (e) If this Court were to find that no appeal lies against a dismissal of an application pursuant to section 17(2)(f), is there any prejudice that an applicant could suffer that cannot be cured by an appeal to this Court, in the normal course?"

[14] All the parties made useful submissions to this Court, including those who had originally elected not to participate in these proceedings. For this, the Court expresses its gratitude.

[15] The Cloete applicants emphasise this Court's findings in *Liesching I* and *II* that section 17(2)(f) affords the President a discretion which ought to be exercised judicially.⁶ They submit that, in practice, the President sits as a Court in chambers when deciding these applications. On this basis, they argue that the nature of the discretion is a judicial one, albeit a limited one, and reviewable in the same way as an ordinary judicial decision. Relying on section 167(6)(b),⁷ they submit that it is in the interests of justice that an appeal against the President's decision in terms of section 17(2)(f) lies directly to this Court, albeit on narrow grounds.⁸

[16] The Cloete applicants contend that there is a dual appeal process, one in respect of a section 17(2)(f) decision and a further appeal in respect of the merits. The State

⁶ *Liesching I* above n 3 at para 55; *Liesching II* above n 5 at para 140.

⁷ Section 167(6) reads:

"National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

- (a) to bring a matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court."

⁸ They list the narrow grounds as that the President erroneously refused the application or did not consider the substance of the application because she incorrectly considered herself *functus officio* or that no exceptional circumstances existed.

and Mr Sekgala support this submission. Nedbank differs with the rest of the parties on this point. Nedbank submits that a litigant may not appeal to this Court within the narrow ambit of a section 17(2)(f) decision and, thereafter, again approach this Court to consider the merits of her appeal. The amicus argues that a section 17(2)(f) appeal may not always be available because it is a narrow appeal. Mr Sekgala further submits that a section 17(2)(f) decision is connected to an appeal in terms of section 168(3)(b)(ii) of the Constitution⁹ and, like the Cloete applicants, contends that the functions of the President are judicial and not administrative.¹⁰

[17] Nedbank submits that a section 17(2)(f) decision should not be appealable to this Court. Relying on *Mabaso*,¹¹ it contends that this approach would not prejudice a prospective appellant because it would not bar her from approaching this Court for leave to appeal on the merits. Nedbank further submits that section 167(6)(b) of the Constitution does not confer jurisdiction on this Court to decide an appeal against the President's decision and that not every exercise of power must be reviewable, particularly when it comes to judicial decisions. Nedbank submits that the mere fact that the President must exercise her powers lawfully and rationally does not mean that there is any entitlement to review or appeal her decision.

Condonation

[18] The Cloete applicants seek condonation for the late filing of their application and written submissions. The State also seeks condonation for the late filing of its written submissions. The delays were not significant and, more importantly, the

⁹ Section 168(3)(b) of the Constitution reads:

“The Supreme Court of Appeal may decide only—

- (i) appeals;
- (ii) issues connected with appeals; and
- (iii) any other matter that may be referred.”

¹⁰ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 at para 45.

¹¹ *Mabaso v Law Society, Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC).

submissions were of assistance to this Court. For these reasons, condonation should be granted.

Analysis

[19] As explained, the issue in this matter is whether an appeal against a section 17(2)(f) decision lies to this Court. In *Liesching II*, this Court did not decide the question of whether an appeal lies to this Court pursuant to a “dismissal” of a section 17(2)(f) application to the President. This question is an important one which has implications for litigants beyond the immediate parties. This Court is now presented with the opportunity to address this question. The issue has two components: does this Court have jurisdiction over these appeals? If so, would this Court ordinarily grant leave to appeal against a section 17(2)(f) decision?

[20] I first address the question of jurisdiction. I find that ordinarily this Court will not have jurisdiction to hear these appeals because their grounds are factual in nature. This is enough to dispose of this case, and so I leave open the further question of whether the section 17(2)(f) decision is a decision of a court.

[21] Nonetheless, I find that even where this Court will have jurisdiction to hear the appeal, the interests of justice will more often than not militate against the granting of leave to appeal.

Jurisdiction

Is the President’s decision a decision of a court?

[22] This Court’s jurisdiction is delineated by section 167 of the Constitution. This section requires that a litigant show that the matter raises a constitutional issue¹² or that it raises an arguable point of law of general public importance,¹³ and that it is in the interests of justice for leave to appeal to be granted. However, that is not the only

¹² Section 167(3)(b)(i) of the Constitution.

¹³ Section 167(3)(b)(ii) of the Constitution.

pre-requisite for this Court to be vested with jurisdiction. Section 167(6) of the Constitution states:

- “National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
- (a) to bring a matter directly to the Constitutional Court; or
 - (b) to appeal directly to the Constitutional Court from any other court.”

[23] It is clear from this section, and in particular the words “from any other court” that appeals to this Court must emanate from another court and be brought in terms of some legislation or court rules. It is for this reason that this Court cannot entertain appeals directly from, for example, the National Consumer Tribunal. This raises the question, does a section 17(2)(f) decision amount to a decision of a court?

[24] The starting point in understanding the powers of the President lies in section 168(2) of the Constitution. It provides that:

“A matter before the Supreme Court of Appeal must be *decided* by the *number of judges* determined in terms of an Act of Parliament.” (Emphasis added.)

[25] The Act of Parliament concerned is the Superior Courts Act. Sections 13(1) and (2) of the Act provide that an appeal before the Supreme Court of Appeal must be presided over by three, five or more Judges and decided by a majority of those sitting. Section 13(4) provides that two or more Judges have the power to decide matters in chambers, including applications for interlocutory relief.

[26] Section 17 of the Act deals with applications for leave to appeal. As far as an application for leave to appeal to the Supreme Court of Appeal is concerned, section 17(2)(c) stipulates that a decision of the Supreme Court of Appeal on an application for leave to appeal must be made by at least two Judges, with a third Judge

added if the two disagree.¹⁴ Section 17(2)(f) also provides that the decision to refuse or grant leave to appeal “shall be final”.

[27] The section creates an exception to this principle of finality in that it provides that—

“the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.”

[28] In order to interpret the proper effect of this exception one must follow the now familiar process of assessing the text, context and purpose of the provision.¹⁵

[29] Is the decision the President makes under the subsection a decision of the Supreme Court of Appeal or not? A reading of the text may go either way. Below I explore arguments for each interpretation. But because I find that the President’s decision cannot be appealed to this Court for other reasons, I refrain from making a determinative ruling that her decision was one of a court.

[30] On the one hand, the President is not given a power to grant leave to appeal herself or make a final decision in this regard. The extent of her power under section 17(2)(f) is to “refer” the decision “to the court” for reconsideration or

¹⁴ Section 17(2)(b) read with section 17(2)(c) indicates that an appeal may be granted by the “Supreme Court of Appeal” and such appeal must be considered by two Judges of that Court. The sections read:

“(b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.

(c) An application referred to in paragraph (b) must be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal and, in the case of a difference of opinion, also by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal likewise designated.”

¹⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 19.

variation. She is but one member of that Court, but not the “court” herself. Section 17(2)(f) makes this plain by saying that the President may refer the matter to “the court” for decision.

[31] The Act generally requires that every decision of the Supreme Court of Appeal, as a court, must be made by at least two Judges.¹⁶ Section 17(2)(f) does not necessarily alter this. Indeed, the section expressly provides that the decision of the President is merely a decision about whether to refer an already dismissed application for leave to appeal, for reconsideration. It is not a decision to grant or refuse leave to appeal. A referral by the President, as a single Judge and member of the Court, can thus not be said to be a decision of the Supreme Court of Appeal.

[32] On the other hand, however, the text is also reasonably capable of being understood merely as a further indication of the number of Judges that must decide a particular matter in terms of section 168(2) of the Constitution, which provides that “a matter before the Supreme Court of Appeal must be *decided* by the *number of judges* determined in terms of an Act of Parliament”.

[33] Seen in context, as previously held by this Court in *Liesching I*, the section 17(2)(f) procedure is part of the appeal process.¹⁷ It involves making a judicial determination on a defined legal issue between the litigating parties.¹⁸ The

¹⁶ See above n 14.

¹⁷ *Liesching I* above n 3 at paras 60-1:

“Sections 327(1) and 17(2)(f) are both geared at preventing an injustice. They serve the same purpose, but at different stages. Section 17(2)(f) does so while the appeal process is still open while section 327(1) applies after the appeal processes are spent and permanently closed. The section 327 procedure is also not a substitute for an appeal. It is a process beyond the appeal stage that is meant to be the final net in order to avoid a grave injustice.

Even after the section 17(2)(f) application is dismissed, the applicants can still approach this Court with an application for leave to appeal. If successful, they could even apply to adduce further evidence in this Court.”

¹⁸ *Id* at para 55:

“The President is given a discretion, to be exercised judiciously, to decide whether there are exceptional circumstances that warrant referral of the matter to the Court for reconsideration or, if necessary, variation. The President must therefore decide whether there are exceptional circumstances. This will depend on the facts and circumstances of each case.”

President's decision under section 17(2)(f) of the Act thus falls comfortably within the judicial function and purpose of the Supreme Court of Appeal leave to appeal process, in this instance, to be exercised by one Judge of that Court, its President.

[34] The Act is, in this sense, ambiguous. This ambiguity is not resolved in this judgment. This is because I find, for independent reasons, that the President's decision cannot be appealed to this Court. Whether that decision is a decision of a court will have to be decided on another day.

Factual grounds of appeal

[35] It is difficult to envisage how an application to appeal a decision of the President under section 17(2)(f) could fall within the parameters of this Court's jurisdiction under section 167(3). In *Liesching II*, this Court held that in order for the President to exercise her power in terms of section 17(2)(f), there must be exceptional circumstances warranting the exercise of this power.¹⁹ As this Court explained in *Liesching I*, whether there are exceptional circumstances "will depend on the facts and circumstances of each case".²⁰

[36] It would follow that, if an appeal lies against the decision of the President, it would essentially amount to an appeal against the factual findings of the President on whether exceptional circumstances exist.²¹ An appeal against purely factual findings does not ordinarily raise a constitutional matter,²² nor does it usually give rise to an arguable point of law, sufficient to bring the matter within this Court's jurisdiction in terms of section 167(3)(b) of the Constitution.²³ This means that ordinarily, even if a section 17(2)(f) decision is final because the merits of the court a quo's judgment

¹⁹ *Liesching II* above n 5 at para 137.

²⁰ *Liesching I* above n 3 at para 55.

²¹ I also express no view on whether the President's decision should be appealed or reviewed. Before us was an appeal, and I restrict my findings to the facts of this case.

²² *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15(a).

²³ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 at para 20.

cannot be appealed to this Court, an appeal against such a decision will not engage the jurisdiction of this Court.²⁴

[37] The appeal in this matter is a case in point. Its grounds are purely factual in nature as they target the President's decision regarding the existence of exceptional circumstances. An appeal of this nature does not engage the jurisdiction of this Court.

Leave to appeal

[38] Even where an appeal against a section 17(2)(f) decision engages this Court's jurisdiction, it will often not be in the interests of justice to grant leave to appeal. This is because the decision will often not be final, granting leave could create a dual appeal process, and no prejudice will result from a refusal to grant leave.

Final decision

[39] It is well accepted in our law that only final decisions or decisions having final effect are appealable, unless the interests of justice require otherwise.²⁵ It is useful to have regard to the general approach of the Supreme Court of Appeal to appealability as explained in *Zweni*:

“A ‘judgment or order’ is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief.”²⁶

²⁴ Perhaps the only example of where such an appeal will engage the jurisdiction of this Court is where there is evidence showing that the section 17(2)(f) decision was taken in bad faith and out of malice.

²⁵ *Tshwane City v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at para 40; *Grancy Property Limited v Seena Marena Investment (Pty) Ltd* [2014] ZASCA 50; [2014] 3 All SA 123 (SCA) at paras 12-22; and *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532J-533A.

²⁶ *Zweni* id.

[40] Does the exercise of the President's power under section 17(2)(f) give rise to a final decision? The answer invariably depends on the facts. In the ordinary course, the President's power under section 17(2)(f) is merely a limited procedural power to ensure that, in truly exceptional cases, a further decision can be taken by the Supreme Court of Appeal. In essence, the power of the President is a power of referral to the Court. It does not dispose of any of the issues or portion thereof. The decision not to refer cannot be said to be appealable, if only because it does not meet the requirements outlined in *Zweni*.²⁷ It is not itself a final decision, nor definitive of the rights of the parties, nor has the effect of disposing of at least a substantial portion of the relief sought in the main proceedings. This means that in the ordinary course, the decision is not appealable, unless there are some other overarching interests of justice that require this Court to grant leave to appeal.

[41] This conclusion – that a section 17(2)(f) decision is not final – must be read with a caveat. It may be that in exceptional circumstances a section 17(2)(f) decision is considered final in nature and hence, in principle, appealable. This is where, for instance, no appeal to this Court on the merits of the court a quo's judgment is available to the applicant.²⁸ In such cases the decision may be final and appealable, but whether the application to appeal that decision will engage this Court's jurisdiction, for reasons outlined above, is a different question. In most instances, as in this case, it will not.

Avoiding a dual-appeal process

[42] The conclusion, that ordinarily it will not be in the interests of justice to grant leave to appeal against a section 17(2)(f) decision, is supported by a further consideration. Section 17(2)(f) does not create a dual-appeal process, which would enable a litigant to approach this Court for leave to appeal against the refusal of an

²⁷ *Id.*

²⁸ This is because, for example, the grounds of appealing the merits are purely factual.

application in terms of that section and then again in respect of the merits. Why do I say so?

[43] The proviso in section 17(2)(f) performs the function of a safety-net, giving the President the power to intervene, in order to cure errors or mistakes, prevent an injustice or where a failure to intervene would result in the administration of justice being brought into disrepute.²⁹ In doing so, it creates a diversion from the usual appeal process by allowing for the reconsideration by the Court of the refusal of leave to appeal by two Judges, at the instance of the President. The path that the matter then takes along the appeal process is determined by the manner in which the President exercises her discretion.

[44] In the event that the President exercises her discretion to refer the decision for reconsideration or variation to the Court, the matter would then be heard by the Supreme Court of Appeal. It will be reconsidered and thereafter may be entertained in full by the Supreme Court of Appeal or dismissed once more. In the ordinary course, an appeal against the decision of the Supreme Court of Appeal (dealing with the reconsideration) may lie to this Court depending on whether it results in a reasoned judgment.

[45] In instances where the President does not refer the decision for reconsideration, the matter would revert to the ordinary, default appeal process. This would mean that the decision of the two Judges refusing leave to appeal would stand as a final decision of the Supreme Court of Appeal and appeal may lie to this Court against the last reasoned judgment.³⁰

[46] I am fortified in this view by the provision in section 17(2)(f) that the decision of the Judges considering an application for leave to appeal under section 17(2)(b)

²⁹ See generally *Liesching I* above n 3; *Avnit v First Rand Bank Ltd* [2014] ZASCA 132; 2014 JDR 2014 (SCA).

³⁰ *Mabaso* above n 11 at para 18; *Swartbooi v Brink* [2003] ZACC 5; 2003 (5) BCLR 497 (CC) (*Swartbooi I*) at paras 3-4.

“shall be final”. The finality of that decision is only disturbed in cases where the President exercises her discretion to “refer the decision” refusing leave to appeal to the Supreme Court of Appeal for reconsideration.

[47] To find, as a matter of course, that an appeal lies to this Court against the decision of the President acting in terms of section 17(2)(f) would in effect create a dual appeal process. It would allow a litigant to appeal to this Court within the narrow ambit of section 17(2)(f): either on the basis that the President was wrong to find that there were no exceptional circumstances or that she failed to exercise her discretion judiciously. Practically, the door would then be open for the same litigant to later appeal to this Court in respect of the merits of the same matter.

[48] In addition, to find that a litigant may appeal to this Court against the section 17(2)(f) decision would be inconsistent with the approach this Court has adopted in regard to appeals from the Supreme Court of Appeal.³¹ Nedbank, in supporting this reasoning, appropriately refers to *Mphahlele*, where this Court held, before the enactment of the Supreme Court Act, that the refusal of leave to appeal by the Supreme Court of Appeal “is not appealable to any other court”.³² This Court further held in *Mabaso* that where leave to appeal is refused in terms of rule 19, subsequent appeals to this Court are not against that refusal:

“It is clear from the text of rule 19, however, that where an application for leave to appeal to the Supreme Court of Appeal is refused by the President of the Supreme Court of Appeal, a refusal which is ordinarily unaccompanied by reasons, any subsequent appeal to this Court is considered to be an appeal, not against the decision of the Supreme Court of Appeal, but against the High Court decision, and the time for lodging the appeal is duly extended. This is consistent with the jurisprudence of this Court under the earlier rules.”³³

³¹ *Mabaso* id at para 18; *Swartbooi I* id at paras 3-4; *Mphahlele v First National Bank of SA* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).

³² *Mphahlele* id at para 14.

³³ *Mabaso* above n 11 at para 18.

[49] In *Swartbooi I*, this Court had to consider the situation where the Supreme Court of Appeal had refused leave to appeal and the litigant wished to apply to this Court for leave to appeal. The question was whether the application for leave to appeal would lie against the decision of the relevant High Court on the merits or the decision of the Supreme Court of Appeal refusing leave to appeal. This Court expressly held that the application for leave to appeal had to be brought against the decision of the High Court on the merits and *not* against the decision of the Supreme Court of Appeal refusing leave to appeal:

“When the Supreme Court of Appeal refuses to grant leave to appeal in a case, the appeal to this Court is not an appeal against the Supreme Court of Appeal’s refusal of leave to appeal to it but an appeal against the High Court decision itself.”³⁴

[50] The approach adopted in *Swartbooi I* was subsequently confirmed by this Court in *Basson I*,³⁵ *Mabaso*³⁶ and *Basson II*,³⁷ unanimously on each occasion. Two principles emerging from these cases are of relevance in this matter. First, that an appeal only lies to this Court against a decision of the Supreme Court of Appeal where that Court has pronounced on the merits of the dispute. Second, where that Court has refused leave to appeal or refused condonation, an appeal would lie to this Court against the judgment of the High Court on the merits.

[51] As was explained in *Mabaso*, there are sound jurisdictional reasons for this approach:

“This approach would protect the inherent power of the Supreme Court of Appeal, as confirmed by the Constitution, ‘to protect and regulate [its] own process’. It would avoid this Court having regularly to second-guess the Supreme Court of Appeal when

³⁴ *Swartbooi I* above n 30 at paras 3-4.

³⁵ *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) (*Basson I*) at paras 79–81.

³⁶ *Mabaso* above n 11 at para 18.

³⁷ *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) (*Basson II*) at paras 129–134.

it refuses condonation which might undermine the Supreme Court of Appeal's autonomous regulation of its own process.”³⁸

[52] This Court also explained that this approach would not prejudice a prospective appellant because it would not be a bar to approaching this Court for leave to appeal on the merits. All that means is that the prospective appellant would have to seek leave from this Court to appeal against the merits of the judgment of the High Court, rather than against the refusal of leave to appeal or refusal of condonation by the Supreme Court of Appeal.³⁹

[53] Admittedly, at the time when these cases were decided, section 17(2)(f) of the Superior Courts Act did not exist. Nevertheless, as submitted by Nedbank, the approach adopted by this Court remains instructive as to the nature of the decision of the President and the proper approach to dealing with potential appeals against section 17(2)(f) decisions by the President.

Is there any prejudice if the President’s decision is not appealable?

[54] The parties agreed that there is little or no prejudice to a litigant if it is held that there is ordinarily no appeal against a section 17(2)(f) decision, which cannot be cured by the avenue of an appeal on the merits. The refusal of a section 17(2)(f) decision is not the end of the road for a litigant; an appeal to this Court is still available. This is a further reason supporting the conclusion that an appeal will not lie against a section 17(2)(f) decision unless there are compelling circumstances.

[55] A litigant who has had her section 17(2)(f) application refused by the President, has already—

- (a) had a full hearing in the High Court and not succeeded on the merits;
- (b) sought and been refused leave to appeal from the High Court;

³⁸ *Mabaso* above n 11 at para 23.

³⁹ *Id* at para 24.

- (c) sought leave to appeal from the Supreme Court of Appeal and been refused leave by two Judges (at the very least); and
- (d) sought and been refused a referral order by the President under section 17(2)(f).

Moreover, a litigant still has the right, after the President's refusal, to approach this Court for leave to appeal against the High Court judgment on the merits.

[56] This is an extensive and generous set of procedural rights and entitlements. There is no need to contend that, in addition, a litigant necessarily has a right to approach this Court to contest the validity of the President's section 17(2)(f) decision. There is a phenomenon referred to as the "tyranny of litigation"⁴⁰ and there must be limits to how many times a litigant is able to reapproach the courts.

[57] In any event, this Court has held that in considering whether to grant leave to appeal, it is necessary to consider whether "allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs".⁴¹ Similarly, in *TAC I*, this Court stated that "it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the

⁴⁰ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at para 16; *Golden International Navigation SA v Zeba Maritime Co Ltd* 2008 (3) SA 10 (C) at para 19. In *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C); [1969] 4 All SA 311 (C) at 445C-F van Wyk J discussing the "tyranny of litigation" stated:

"This decision also has a bearing on the issue as to whether the Court should, in the circumstances, allow the applicant to proceed with the application for an interdict *pendente lite*. If one bears in mind the long delays, for which no explanation has been given, that as far back as December the applicant had numerous clear cases of copying in its possession, according to the letter written by the applicant, and that up to now no action has been instituted, it seems that the applicant has erred in selecting this method, namely, an application for an interdict *pendente lite*, but even if it was the appropriate procedure at the time the applicant has, by reason of the facts stated above, forfeited its rights to this temporary relief. Had it issued summons at the time when the notice of motion proceedings were instituted, the trial could already have taken place.

There is such a thing as the tyranny of litigation, and a court of law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an interdict *pendente lite* which, from its very nature, requires the maximum expedition on the part of an applicant."

⁴¹ *South African Informal Traders Forum v City of Johannesburg* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) at para 20(g) (*Informal Traders*).

proper resolution of the matter in the court of first instance”.⁴² This is one of the main reasons why interlocutory orders are generally not appealable while final orders are.⁴³

[58] This Court has held that it will only interfere in pending proceedings in the lower courts in cases of “great rarity – where grave injustice threatens, and where intervention is necessary to attain justice”.⁴⁴

[59] Granting leave to appeal against the President’s decision in terms of section 17(2)(f) would normally result in the same difficulties that arise with the determination of interlocutory orders – leaving protracted litigation pending, piecemeal adjudication of issues and ultimately wasting court resources at the expense of the parties.⁴⁵ If this Court were to entertain appeals against a section 17(2)(f) decision, it would first have to decide whether the President’s decision falls to be reviewed and set aside. If it does, this Court would likely refer the matter back to the President to decide afresh. In the event that the President decided to refer the matter for reconsideration that would mean that the Supreme Court of Appeal would decide whether or not to grant leave to appeal. If they granted leave to appeal, the appeal would be heard by that Court. At the end of that process, an unsuccessful litigant would have the right to approach this Court again, for an appeal on the merits, this time.

[60] In my view, this approach is simply not consistent with the interests of justice. This is especially so where there is a readily available mechanism to prevent any injustice, let alone a grave injustice. This is to direct that a litigant dissatisfied with the President’s decision must instead seek leave to appeal to this Court against the High Court decision on the merits. Indeed, rule 19(2) of this Court’s Rules expressly

⁴² *Minister of Health v Treatment Action Campaign (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 1075 (CC) (TAC I) at para 9.

⁴³ *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation* [2017] ZASCA 134; 2018 (6) SA 440 (SCA) at para 48; *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 47.

⁴⁴ *Psychological Society of South Africa v Qwelane* [2016] ZACC 48; 2017 JDR 0062 (CC); 2017 (8) BCLR 1039 (CC) at para 40.

⁴⁵ *Informal Traders* above n 41 at para 20.

recognises this. It states that while leave to appeal must be sought from this Court within 15 days of the delivery of the judgment being appealed against, this is subject to the proviso—

“that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave.”

[61] That rule has been interpreted to refer to the refusal of leave to appeal by the Supreme Court of Appeal (as opposed to the refusal of a section 17(2)(f) application by the President),⁴⁶ and its intent is clear. Once a litigant has exhausted her options in the Supreme Court of Appeal she may then apply for leave to appeal to this Court within 15 days.

[62] On this approach, there is no possible prejudice to the litigant caused by this Court not normally hearing appeals from the President’s section 17(2)(f) decision. Once the President has made her section 17(2)(f) decision, the litigant has 15 days to approach this Court to seek leave to appeal against the High Court decision.

[63] Two results are possible. If this Court grants leave to appeal, then there is plainly no prejudice. If this Court refuses leave to appeal, it means that the litigant has then failed to persuade four different judicial fora that she has reasonable prospects of success – the High Court Judge, the two Judges in Supreme Court of Appeal, the President of the Supreme Court of Appeal and this Court. It is then perfectly fair and non-prejudicial to say that the matter has come to an end.

Conclusion

[64] Section 17(2)(f) is simply a further safety net within the appeals process. It is not necessary for an appeal against a section 17(2)(f) decision to be available separately where a litigant may still approach this Court on appeal. It would not

⁴⁶ *Mabaso* above n 11 at para 18.

prejudice a prospective appellant, because the avenue to appeal to this Court would still be available.⁴⁷

[65] I am compelled to the conclusion that normally no appeal lies against the decision of the President pursuant to section 17(2)(f). An applicant who wishes to appeal must do so within the ordinary appeal process.

Costs

[66] There is no reason to award costs in this matter. Both applications were not opposed and the subsequent participation of the parties, after the issuing of directions, assisted this Court in reaching a just and reasoned outcome.

[67] The following order is made:

Under CCT 324/17 (*Cloete and Another v S*):

1. The applications for condonation are granted.
2. The application for leave to appeal is dismissed.
3. There is no order as to costs.

Under CCT 63/18 (*Sekgala v Nedbank Limited*):

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

⁴⁷ Id at para 24.

For the Applicants in CCT 324/17:

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Viviers Inc

For the Respondent in CCT 324/17:

M D Moeketsi instructed by the
Director of Public Prosecutions

For the Amicus Curiae in CCT 324/17:

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For the Applicant in CCT 63/18:

Unrepresented

For the Respondent in CCT 63/18:

S Budlender and T Ramogale
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Merwe Inc